Murtha & another v Murungi (Sued as the Administrator of the Estate of William Peter Muriungi (Deceased)) (Enviromental and Land Originating Summons 39 of 2018) [2025] KEELC 6405 (KLR) (25 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6405 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIROMENTAL AND LAND ORIGINATING SUMMONS 39 OF 2018

JO MBOYA, J

SEPTEMBER 25, 2025

BETWEEN

HENRY KATHIORA MURTHA ..... 1ST PLAINTIFF

JULIUS BUNDI RIMBERE ..... 2ND PLAINTIFF

AND

FLORENCE GACHERI MURUNGI ..... DEFENDANT

SUED AS THE ADMINISTRATOR OF THE ESTATE OF WILLIAM PETER MURIUNGI (DECEASED)

RULING

1. The facts of this matter and in particular, the current application dated 19th July 2025; brings to mind the observation of the Court of Appeal in the case of Kahoro & 2 others (Suing on their Behalf and on Behalf of Members of Twendane Company Limited) v Kanyamwi Trading Company Limited [2025] KECA 941 (KLR) where the Court stated thus:

> In the contemporary world, one animal known for changing its colour to camouflage with its surrounding environment is the chameleon. It will be green in the morning, brown in the afternoon and yellow in the evening, depending on where its majestic walk has taken it. In the legal world, it is known that parties may attempt to approach the court in different shades, while remaining the same parties. To prevent this mischievous way of litigation, the doctrine of res judicata was developed to bar parties from bringing a litigious action once a final determination has been made on the merits of a similar previous suit.

2. The Applicant, beforehand was the defendant in the main suit. The applicant participated in the proceedings culminating into the judgment that was delivered by the court [differently constituted] on the 22nd September 2021. For good measure, the court found and held that the respondent herein

had proved and established their claim. Consequently, the court proceeded to and decreed that the suit properties be transferred to and registered in the names of the respondents on the basis of adverse possession.

3. Following the delivery of the Judgment rendered on 22nd September 2021, the applicant herein felt aggrieved and thus filed a Notice of Appeal. The notice of appeal is dated 28th September 2021. Furthermore, the applicant also filed an application for stay of execution of the judgment pending the hearing and determination of the intended appeal.

4. It is instructive to observe that the application for stay of execution pending the hearing and determination of the intended appeal was heard and disposed of vide ruling rendered on 2nd March 2022. For coherence, the court [differently constituted] allowed the application and granted the orders of stay of execution of the judgment and the consequential decree subject to deposit of the original title deeds of [sic] of the suit properties.

5. The applicant herein did not comply with the terms of the ruling. Instead, the applicant reverted to court with yet another application seeking review of the orders that were issued vide ruling rendered on 2nd March 2022. In particular, the applicant herein contended that same had misplaced the original title deeds and thus sought to have the condition varied and to be allowed to deposit the green cards of the properties. The said application was heard and disposed of vide ruling dated 30th November 2022.

6. Undeterred, the applicant has now returned to court vide application dated 19th July 2025; and wherein same seek the following reliefs;

    i. The Application be certified urgent and service thereof be dispensed within the first instance.

    ii. Pending the hearing and final determination of this application, a conservatory order by way of injunction do issue restricting any dealings on the properties know as Nyaki/Kithoka/2573 and 2574.

    iii. Pending the hearing and final determination of the intended appeal against the judgment issued herein on 22nd September 2021 and amended on 14th July 2021, a conservatory order by way of injunction do issue restricting any dealings on the properties known as Nyaki/Kithoka/2573 and 2574.

    iv. Costs of this Application be provided for.

7. The instant application is premised on various grounds which have been highlighted in the body thereof. Furthermore, the application is supported by the affidavit of the applicant [Florence Gacheri Murungi] sworn on even date. In addition, the deponent has annexed various documents including copies of the previous rulings rendered by this court.

8. The respondents filed grounds of opposition dated 16th September 2025 and wherein the respondents contended that the subject application is barred by the doctrine of res judicata. In particular, the respondents cited and highlighted the provisions of section 7 of the *Civil Procedure Act*, Cap 21 Laws of Kenya.

9. The application came up for hearing on 16th of September 2025; and whereupon the advocates agreed to canvass and dispose of the application by way of oral submissions. For good measure, the submissions canvassed on behalf of the parties form part of the record of the court.

10. Learned counsel for the applicant adopted the grounds contained at the foot of the application and reiterated the averments in the body of the supporting affidavit. In addition, learned counsel highlighted two [2] salient issues for consideration by the court.

11. Firstly, learned counsel for the applicant has submitted that the application beforehand is not prohibited by the doctrine of res judicata in so far as the circumstances underpinning the application are different from the circumstances under which the previous applications were made. Moreover, learned counsel submitted that the previous applications were made on the basis of the title documents, which have since been found to be non-existent. To this end, learned counsel invited the court to take cognizance of the orders that were made pertaining to the correction of the title numbers.

12. Secondly, learned counsel submitted that the applicant herein is at liberty to file and mount the current application on the basis of the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules which allows an applicant to revert back with an application for stay of execution. In this regard, learned counsel for the applicant cited and referenced the holding in the case of Chase Bank (K) Ltd vs Kariuki (2014) KEHC 9854. Furthermore, learned counsel implored the court to take cognizance of paragraph 23 of the said decision, which [sic] underscore[s] the principle that an Applicant is at liberty to file a second application for stay of execution before the same court in the event of change of [sic] circumstances.

13. Finally, learned counsel for the applicant has submitted that the current application seeks conservatory orders of injunction and not stay of execution pending appeal. In this respect, counsel submitted that the application is therefore distinct from the previous application[s] which were heard and disposed of by the court.

14. Learned counsel for the respondent adopted the grounds of opposition dated 16th September 2025; and thereafter highlighted two [2] issues. Learned counsel for the respondent submitted that the applicant herein had previously filed an application for a stay of execution of the judgment and decree of the court. Furthermore, it was submitted that the application under reference was heard and allowed. However, it was posited that the applicant failed to comply with and or adhere to the terms of the ruling of the court.

15. Additionally, learned counsel for the respondents has submitted that the applicant filed yet another application and wherein same sought review of the ruling previously issued on the question of stay of execution. It was contended that the application for review was also heard and disposed of.

16. Arising from the foregoing, learned counsel for the Respondent has submitted that the current application is res judicata. In particular, it has been contended that though the application seeks orders of injunction, the net effect of the order sought is to suspend; avert; and defer the implementation of the terms of the judgment which was rendered by the court.

17. Other than the foregoing, learned counsel for the respondent has also submitted that the court is divested of jurisdiction to grant conservatory orders of injunction pending the hearing and determination of the intended appeal. To this end, counsel posited that this court has not been granted any authority and or mandate to issue such an order. On the contrary, learned counsel submitted that this court in exercise of its appellate jurisdiction, can only issue an order of temporary injunction where the appeal emanates from the lower court and not otherwise. In this respect counsel cited and referenced the provisions of Order 42 Rule 6 (6) of the Civil Procedure Rules.

18. Having reviewed the application and upon consideration of the submissions tendered on behalf of the respective parties, I come to the conclusion that the determination of the subject application turns on three [3] key issues, namely; whether the application is prohibited by the doctrine of res judicata or otherwise; whether the application constitutes an abuse of the due process of the court; and whether the court is seized of the requisite jurisdiction to grant the orders of injunction pending the hearing of the intended appeal to the court of appeal.

19. Regarding the first issue, it is common ground that the applicant herein filed an application dated 30th November 2021 and wherein the applicant sought an order of stay of execution of the judgment and the consequential decree pending the hearing and determination of the intended appeal. The said application was heard and disposed of vide ruling dated 2nd March 2022. Suffice it to underscore that the application under reference was allowed, albeit on terms.

20. It is instructive to highlight that the applicant herein failed to comply with the terms of the ruling and therefore the orders of stay of execution which had been granted, lapsed.

21. On the other hand, it is also apparent from the record that the applicant returned to court with an application for review and wherein same sought to review the terms of the ruling which granted the order of stay. For good measure, the latter application was equally heard and dismissed.

22. I have highlighted the two applications so as to demonstrate that the applicant herein has previously sought to suspend the implementation and or execution of the judgment and decree of the court. Instructively, an order of stay of execution of the judgment operates to suspend and or hold the judgment in abeyance.

23. Similarly, a conservatory order of injunction [like the one being sought] is intended to hold the judgment in abeyance. To my mind, the import and tenor of the order of temporary injunction being sought is the same as the order of stay of execution of execution which had previously been sought.

24. What is notable; and apparent is that the applicant herein has only switched the terminologies. Nevertheless, the net effect of what the applicant is seeking is suspension and or postponement of the judgment that was rendered by the court. I beg to say that this is a classic case of semantic[s].

25. To my mind, whether the applicant baptizes the orders sought as a conservatory order of temporary injunction; or an order of stay of execution of execution pending the hearing of [sic] the Intended Appeal [whichever is the case] the net effect is one and the same. Moreover, there is no gainsaying that the orders now being sought by the applicant could very well have been sought in the previous applications.

26. Flowing from the foregoing, I come to the conclusion that the current application is barred by the doctrine of res judicata. In particular, constructive res judicata prohibits the raising of an issue which ought to have been canvassed in the previous case and or application. Such is the case beforehand.

27. The import and tenor of the doctrine of constructive res judicata was expounded by the Court of Appeal in the case of Kenya Commercial Bank Ltd vs Benjoh Amalgamated (2017) eKLR.

28. For coherence, the court stated and held thus;

> Cognizant of the above principles, the courts called upon to decide suits or issues previously canvassed or which ought to have been raised and canvassed in the previous suits have not shied away from invoking the doctrine as a bar to further suits. As was stated in Henderson v Henderson (1843) 67 ER 313, res judicata applies not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. In the case of Mburu Kinyua v Gachini Tutu (1978) KLR 69 Madan, J. Quoting with approval Wilgram V.C. in Henderson v Henderson (supra) stated:
>
> > "Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation

> to bring forward their whole case and will not (except in special circumstances) permit the same parties to open the same subject of ligation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time" [emphasis added].

29. Flowing from the foregoing, I find and hold that save for the change in terminology and the attendant semantics, the issues being raised by the applicant herein are clearly res judicata.

30. Turning to the second issue, I beg to highlight that every litigant is entitled to a bite on the cherry of justice. However, a single litigant cannot take it on him/herself to be twisting the same issue time and again, in an endeavor to evade; circumvent; and defeat the snares of res judicata.

31. Moreover, it is common ground that where one party files a plethora of suits and or applications [like the one beforehand] such conduct constitutes and amounts to abuse of the due process of the court. In this regard, I beg to reference the decision in the case of Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] KEHC 6100 (KLR) where Justice Mativo, Judge [as he then was] stated as hereunder;

> " 28. Multiplicity of actions on the same matter between the same parties, even where there exists a right to bring the action is regarded as an abuse. [18] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose and aim of person exercising the right to harass, irritate, and annoy the adversary and interface with the administration of justice. [19] I find no difficulty in concluding that this Judicial Review Application is based on similar grounds as the Petition referred to above."
>
> [See also the holding in the case of Rutongot Farm Ltd vs Kenya Forest Service (2018) KESC].

32. Without belabouring the point, I find and hold that the current application by the applicant constitutes and amounts to an abuse of the due process of the court. Indeed, the application beforehand falls in the category of what constitutes classic abuse of the due process of the court. Same ought to be frowned upon.

33. Next is the issue as pertaining to the jurisdiction of the court to grant an order of injunction pending the hearing and determination of [sic] the intended appeal. It is common ground that the appeal beforehand is one from this court to the court of appeal and not an appeal from the subordinate court to this court. The distinction is critical because where this court is exercising its appellate jurisdiction on a decision from the subordinate court, this court is seized of jurisdiction to grant an order of temporary injunction [where appropriate]. To this end, the provisions of Order 42 Rule 6 (6) of the Civil Procedure Rules are instructive and apt.

34. For ease of reference, the provisions of Order 42 Rule 6 (6) [supra] stipulate as hereunder;

> (6) Notwithstanding anything contained in sub-rule (1) of this rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

35. As pertains to an application for injunction pending the hearing of an intended appeal to the Court of Appeal, I beg to state that there is no equivalent provision under Order 42 of the Civil Procedure Rules. I do not wish to speculate on the reason why the rules committee did not deem it appropriate to make such a rule. However, I beg to underscore that this court, as well as all other courts, derive their jurisdiction from *the constitution* and the statute. For good measure, a court of law can only exercise a jurisdiction that has been clearly and explicitly donated. In the absence of a clear and express provision donating jurisdiction, a court of law must not arrogate unto itself jurisdiction by way of innovation and or strained reasoning.

36. In the case of Macharia & another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling) the Supreme Court of Kenya [the apex court] stated as hereunder;

> A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

37. In the absence of a clear provision of the law donating authority and or jurisdiction unto this court to grant conservatory order of temporary injunction pending the hearing and determination of [sic] the intended appeal, I am afraid that the reliefs sought at the foot of the current application have been mounted in vacuum.

38. Before concluding on this aspect of the matter, it is also important to mention that the notice of appeal [which founds the intended appeal] is dated 28th September 2021. It is common knowledge that the applicant herein ought to have filed the appeal within 60 days of the lodgment of the notice of appeal. However, it is apparent that more than 60 days have lapsed and there is no mention of an appeal having been filed. The question that does arise is whether the notice of appeal can still be referenced for purposes of [sic] procuring the injunction sought [if at all].

FINAL DISPOSITION

39. Having analyzed the issues that were highlighted in the body of the ruling, I am afraid that the application beforehand is not only premature and misconceived, but same amounts to an abuse of the due process of the court.

40. To this end, the application courts dismissal.

41. In a nutshell, the final orders that commend themselves to me are as hereunder;

    i. The Application be and is hereby dismissed.

    ii. Costs of the Application be and are hereby awarded to the Respondents.

    iii. To avert the filing of a further bill of costs, the costs in terms of clause [ii] are assessed and certified in the sum of Kshs.25,000/= only.

42. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 25TH DAY OF SEPTEMBER 2025

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE

In the presence of:

Hussein – Court Assistant

Mr. Paul Ogunde for the Applicant

Mr. Mwanzia for the Respondents